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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al., Plaintiffs, **v.** **ANDREW WHEELER, et al.,** Defendants, **STATE OF GEORGIA, et al.,** Intervenor-Defendants	**Case No. 3:20-cv-03005-RS** **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES** Date: June 3, 2021 Time: 1:30 pm Courtroom: Courtroom 3 – 17th Floor San Francisco Courthouse Judge: The Honorable Richard Seeborg Action Filed: May 1, 2020

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GLOSSARY

1980s Regulations	Regulations issued in the 1970s and 1980s to define "waters of the United States" under the Clean Water Act. 42 Fed. Reg. 37, 144 (July 19, 1977); 45 Fed. Reg. 85,336 (Dec. 24, 1980); 47 Fed. Reg. 31,794 (July 22, 1982); 51 Fed. Reg. 41,206 (Nov. 13, 1986); 53 Fed. Reg. 20,764 (June 6, 1988).
2015 Clean Water Rule or 2015 Rule	80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. § 328.3 (2015)
2019 Rule	84 Fed. Reg. 4,154 (Feb. 14, 2019)
2020 Rule or Rule	The Navigable Waters Protection Rule: Definition of "Waters of the United States 85 Fed. Reg. 22,250 (Apr. 21, 2020) (2020 Rule or Rule)
APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
AR	Administrative Record
Army Corps	United States Army Corps of Engineers
CWA or Act	Clean Water Act, 33 U.S.C. §1251 *et seq.*
Connectivity Report	EPA Office of Research and Development "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence"
EA	Economic Analysis
EPA	United States Environmental Protection Agency
RPA	Resource and Programmatic Assessment
Science Board	EPA's Science Advisory Board
TSD	Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (2015)

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on June 3, 2021, at 1:30 pm, or as soon as it may be heard, Plaintiffs, by and through their undersigned counsel, will, and hereby do, move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. This motion will be made before the Honorable Judge Richard Seeborg, San Francisco Courthouse, Courtroom 3 – 17th Floor, 450 Golden Gate Avenue, San Francisco, California 94102.

This motion is based the Memorandum of Points and Authorities, the declarations in support filed herewith and previously in this matter, the administrative record for *The Navigable Waters Protection Rule: Definition of "Waters of the United States,"* 85 Fed. Reg. 22,250 (Apr. 21, 2020) (2020 Rule or Rule), and the Court's entire file in this litigation.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs (the States and Cities) challenge the 2020 Rule which drastically narrows the "waters of the United States" protected by the Clean Water Act (CWA or the Act). With the 2020 Rule the EPA and the Army Corps (collectively, the Agencies) exclude from CWA jurisdiction (1) all ephemeral streams and any other streams that do not contribute surface flow to another water covered by the Rule ("covered water") in a "typical year"; (2) most wetlands that do not have a surface water connection to another covered water; and (3) interstate waters as an independent category. The Rule is invalid under either of the two "distinct standards" that courts apply in reviewing agency regulations: the standard for agency decisionmaking under *Motor Vehicle Manufacturers Ass'n of U.S., Inc. v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29 (1983) (*State Farm*), and the standard for statutory interpretation under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984) (*Chevron*). *Altera Corp. & Subsidiaries v. Comm'r of Internal Revenue*, 926 F.3d 1061, 1075 (9th Cir. 2019) (citation omitted) (*Altera*).

The Agencies' decisionmaking is flawed for three independent reasons. First, the Agencies fail to examine important factors or address their prior factual findings, as required by *State Farm* and *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 538 (2009) (*Fox*). As the administrative

record shows, while they state that the Rule balances the Act's objective of maintaining the integrity of the Nation's waters with the rights and responsibilities of states, the Agencies fail to examine how excluding all ephemeral streams and countless wetlands will impact water quality or state rights and responsibilities. Second, the Agencies ignore their prior factual findings about the impact on downstream water quality of the ephemeral streams and wetlands that the Rule excludes. They also adopt a vague and uncertain "typical year" requirement that conflicts with CWA's goal of protecting and enhancing water quality. Third, the Agencies fail to examine the reliance interests of the States and Cities, who have relied on prior long-standing definitions of "waters of the United States" that included those streams and wetlands, as required by *Encino Motorcars, LLC. v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (*Encino Motorcars*).

Alternatively, the 2020 Rule is unlawful under the *Chevron* standard for statutory interpretation because it is based on an unreasonable and impermissible interpretation of the CWA and conflicts with precedent. By excluding many previously covered waters from CWA protection, the Rule is contrary to the Act's text, structure, and purpose, and controlling Supreme Court decisions.

Accordingly, the States and Cities are entitled to summary judgment vacating the Rule.

STATUTORY AND REGULATORY BACKGROUND

I. THE CLEAN WATER ACT

The CWA's "objective . . . is to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the Act prohibits discharges of pollutants from point sources to "navigable waters" without a permit or in violation of a permit. *Id.* §§ 1311(a), 1342, 1344, 1362(12). "Navigable waters" are "the waters of the United States, including the territorial seas." *Id*. § 1362(7). This includes interstate waters. *Id.* § 1313(a) (specifying that protections for interstate waters under the CWA "shall remain in effect" without regard to navigability).

Before the CWA was enacted in 1972, states were primarily responsible for water pollution control, with the federal government playing a limited role. S. Rep. No. 92-414, at 2 (1971) (1971 WL 11307, at *3669). In passing the Act, however, Congress recognized that this state-led

scheme had been "inadequate in every vital aspect," leaving many waters "severely polluted." Congress responded by deliberately replacing the ineffective patchwork of state laws with the CWA, "an all-encompassing program of water pollution regulation." *Id*. at 7 (1971 WL 11307, at *3674); *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981). Through the Act, Congress created a uniform "national floor" of water quality protection by establishing minimum pollution controls for "waters of the United States." *Arkansas v. Oklahoma,* 503 U.S. 91, 110 (1992) (CWA authorizes EPA "to create and manage a uniform system of interstate water pollution regulation").

The CWA requires permits for two categories of discharges to "waters of the United States": (1) discharge of a "pollutant" from a "point source"; and (2) discharge of dredged or fill material. 33 U.S.C. §§ 1342, 1344, 1362(6), (14). Permits for discharges from point sources are issued under Section 402 by EPA or authorized states. *Id*. § 1342(a), (b). Permits for discharges of dredged or fill material are issued under Section 404 by the Army Corps or authorized states. *Id*. § 1344(a), (h). Nearly all states operate the Section 402 permit program, and nearly all states rely on the Army Corps to operate the Section 404 permit program.[1]

The Act provides additional mechanisms for protecting "waters of the United States." Under Section 303, states are required to establish water quality standards for waters within their borders and impose additional pollution restrictions on waters that fail to meet those standards. 33 U.S.C. § 1313. Under Section 401, a project within a state that requires a federal license or permit and that may result in a discharge into "waters of the United States" is required to obtain a "water quality certification" from the state certifying that the project will comply with the Act and applicable state laws. *Id.* § 1341. Section 404 dredge or fill permits by the Army Corps and licenses for pipelines or hydropower projects by the Federal Energy Regulatory Commission are among the federal permits triggering Section 401 state certification requirements. *Id*.

Nationwide controls are critical to protecting water quality in downstream states because many of the Nation's waters cross state boundaries and downstream states have limited ability to control water pollution sources in upstream states. *See Int'l Paper Co. v. Ouellette,* 479 U.S. 481,

[1] *See* https://www.epa.gov/npdes/npdes-state-program-authority; https://www.epa.gov/cwa-404/state-or-tribal-assumption-cwa-section-404-permit-program.

490-91 (1987) (*Ouellette*). Those controls "prevent the 'Tragedy of the Commons' that might result if jurisdictions [could] compete for industry and development by providing more liberal limitations than their neighboring states." *NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977) (citation omitted). Downstream states are disadvantaged if they have to impose more stringent controls to address pollution from upstream states to safeguard public health and welfare within their own borders. *See United States v. Ashland Oil & Transp. Co.,* 504 F.2d 1317, 1326 (6th Cir. 1974).

Section 101(b) of the Act states Congress's policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution," and "to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). The primary purpose of Section 101(b) is to provide for state implementation of the CWA permit programs. *See A Legislative History of the Water Pollution Control Act Amendments of 1972*, Committee Print Compiled for the Senate Committee on Public Works by the Library of Congress, Ser. No. 93–1, p. 403 (1973) (hereinafter, Dkt. No. 31-1, Ex. P) (referencing Section 101(b) and the "responsibility of states to prevent and abate pollution by assigning them a large role in the national discharge permit system established by the Act"). Accordingly, within the CWA framework, state rights and responsibilities are carried out as part of "a regulatory partnership," *Ouellette,* 479 U.S. at 499, "between the States and the Federal Government animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas*, 503 U.S. at 101.

II. "WATERS OF THE UNITED STATES" – PREVIOUS AGENCY RULEMAKING AND GUIDANCE, AND SUPREME COURT CASELAW

The CWA does not define "waters of the United States" and the Agencies have defined those waters by regulation and guidance. Of relevance here, the Agencies defined those waters in regulations issued in the 1970s and 1980s (1980s definition). 42 Fed. Reg. 37, 144 (July 19, 1977); 45 Fed. Reg. 85,336 (Dec. 24, 1980); 47 Fed. Reg. 31,794 (July 22, 1982); 51 Fed. Reg. 41,206 (Nov. 13, 1986); 53 Fed. Reg. 20,764 (June 6, 1988). The Supreme Court reviewed the 1980s definition in three decisions: *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121

(1985) (*Riverside Bayview*); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*); and *Rapanos v. United States,* 547 U.S. 715 (2006) (*Rapanos*). Following *SWANCC* and *Rapanos*, the Agencies issued guidance in 2003 and 2008, respectively. *See* 68 Fed. Reg. 1995 (Jan. 15, 2003) (*SWANCC* guidance); *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) (*Rapanos* Guidance), Administrative Record (AR) EPA-HQ-OW-2018-0149-11695.[2]

In 2015, the Agencies issued the Clean Water Rule (2015 Clean Water Rule or 2015 Rule). 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 3113 C.F.R. § 328.3 (2015)). In 2019, before issuing the regulation under review here, the Agencies issued a regulation (2019 Rule) that repealed the 2015 Rule and reverted to the 1980s definition. 84 Fed. Reg. 4154 (Feb. 14, 2019).

All three sets of regulations predating the 2020 Rule defined "waters of the United States" to include navigable-in-fact or "traditionally navigable waters," interstate waters, and the territorial seas. Those regulations differed in their treatment of non-navigable tributaries and wetlands but did not exclude all ephemeral streams and did not require wetlands to have a surface water connection to other covered waters.

A. The 1980s Definition

In addition to defining "waters of the United States" to include traditionally navigable waters, interstate waters, and the territorial seas, the 1980s definition included tributaries of those waters and wetlands that were "adjacent to" them, defining "adjacent" to mean "bordering, contiguous, or neighboring." *See* 51 Fed. Reg. 41,206 (Nov. 13, 1986) (codified at 33 C.F.R. § 328.3 (c) (1987)).

[2] Documents in the Administrative Record contain the prefix EPA-HQ-OW-2018-0149 followed by the Docket Document ID. Citations to the Administrative Record herein omit the prefix and cite only to the Docket Document ID. Thus, document EPA-HQ-OW-2018-0149-11695 will be cited as "AR 11695." All AR page citations are to the page number of the electronic PDF due to the inconsistent application of enumerated page numbers across the record. All AR citations hyperlink to the www.regulations.gov URL provided in the Administrative Record Index. Dkt. No. 206-2. For those www.regulations.gov pages containing multiple documents, clarifying language identifies the referenced document. For www.regulations.gov pages that contain PDFs of both a cover letter to a public comment and the public comment itself, the AR page citations are only to the PDF page number of the comment.

B. Supreme Court Decisions Regarding the 1980s Definition

In *Riverside Bayview*, the Supreme Court unanimously held that wetlands adjacent to traditionally navigable waters are "inseparably bound up" with such waters and thus properly included in the regulatory definition of "waters of the United States." 474 U.S. at 134. The Court based its holding on the observation that "Congress chose to define the waters covered by the Act broadly . . . as 'the waters of the United States,'" with the clear "inten[t] to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes." *Id.* at 133.

The Court in *Riverside Bayview* emphasized that the Act's objective —"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a) —"incorporated a broad, systematic view of the goal of maintaining and improving water quality," and that "the word 'integrity'. . . refers to a condition in which the natural structure and function of ecosystems [are] maintained." 474 U.S. at 132 (citing legislative history). Noting "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems," the Court explained that, as Congress recognized, "[p]rotection of aquatic ecosystems . . . demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *Id.* at 132-33 (citing legislative history).

In *SWANCC*, the Court held that the Agencies had incorrectly interpreted "waters of the United States" to encompass isolated, intrastate ponded waters in abandoned sand and gravel pits based solely on their use as habitat for migratory birds. 531 U.S. at 167. The Court confirmed the approach in *Riverside Bayview*, stating that it "found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the waters of the United States.'" *Id.* at 167 (internal quotation marks omitted). Thus, the Court made clear that the Act protects adjacent wetlands because of their "significant nexus" to traditional navigable waters. *Id.*

In *Rapanos*, the Court revisited the scope of "waters of the United States" and issued several opinions. The four-Justice plurality would have limited "waters of the United States" to "relatively permanent, standing or flowing bodies of water . . . [not] ephemeral flows of water,"

and "those wetlands with a continuous surface connection" to them. *Id.* at 732-33, 742. Justice Kennedy disagreed, concluding in a concurring opinion that "waters of the United States" include traditional navigable waters and other waters with a "significant nexus" to navigable waters. *Id*. at 779. Justice Kennedy found that the plurality's "relatively permanent" waters and "surface connection" limitations were "inconsistent with the Act's text, structure and purpose." *Id*. at 776. Writing for four Justices in dissent, Justice Stevens found that the plurality's relatively-permanent-waters and surface-connection limits were "without support in the language and purposes of the Act or in our cases interpreting it." *Id.* at 800 (quoting Justice Kennedy's concurrence).

Both Justice Kennedy's concurrence and Justice Stevens' dissent emphasized that defining "waters of the United States" under the Act requires consideration of the critical functions performed by streams and wetlands and how they affect the chemical, physical, and biological integrity of downstream waters. Pointing out that the plurality's requirements "made little practical sense in a statute concerned with downstream water quality," Justice Kennedy noted that in the western United States, "irregular flows" in streams that are "often-dry water-courses" have significant downstream effects. 547 U.S. at 769. He also repeatedly stressed the important functions wetlands perform to maintain the integrity of downstream waters, including trapping and neutralizing of pollutants, flood prevention, control of surface run-off and erosion, and nutrient recycling. *Id.* at 775, 777, 779. And Justice Kennedy found that "wetlands [had] 'significant effects on water quality and the aquatic ecosystem'" regardless of whether their "moisture originat[ed]" in "flooding or permeation" from "neighboring waterways," and that "it may be the absence of interchange of waters . . . that makes protection of the wetlands critical to the statutory scheme." *Id*. at 773-74, 775 (citations omitted). Similarly, Justice Stevens repeatedly referenced wetlands' functions such as "nesting, spawning, rearing and resting sites for . . . species . . . valuable storage areas for storm and flood waters . . . and provid[ing] significant water purification functions" that "are integral to the 'chemical, physical, and biological integrity of the Nation's waters.'" *Id.* at 796 (citations omitted); *see id.* at 797-99, 803-04, 807-08.

C. The 2008 *Rapanos* Guidance

In the 2008 *Rapanos* Guidance the Agencies explained that the "significant nexus" standard for identifying "waters of the United States" was the "controlling" standard, and required the Agencies to "focus[] on the integral relationship between the ecological characteristics" of tributaries and wetlands. *Rapanos Guidance*, AR 11695 at 3, 9. The Agencies stated that, in addition to traditionally navigable waters, the territorial seas, and interstate waters, the "waters of the United States" include: (1) relatively permanent non-navigable tributaries of traditionally navigable waters; and (2) wetlands that are adjacent to traditionally navigable waters, including wetlands that have a shallow subsurface connection to them as well as wetlands that directly abut relatively permanent non-navigable tributaries. *Id.* at 4-7. The guidance further provided that the Agencies would rely on case-by-case "significant nexus" analyses to assess whether non-navigable tributaries that are not relatively permanent, including ephemeral streams, and their adjacent wetlands are "waters of the United States." *Id.* at 8-11.

D. The 2015 Clean Water Rule

The 2015 Clean Water Rule replaced the 1980s definition. The rule defined the waters protected by the Act based on "the text of the statute, Supreme Court decisions, the best available peer-reviewed science, public input, and the agencies' technical expertise and experience." 80 Fed. Reg. at 37,055. Like Justice Kennedy's concurrence in *Rapanos* and the *Rapanos* Guidance, the rule relied on the "significant nexus" standard. *See* 80 Fed. Reg. at 37,057.

In promulgating the rule, the Agencies carefully relied upon a report prepared by EPA's Office of Research and Development, entitled "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (Connectivity Report), which accounted for more than 1,200 peer-reviewed publications. 80 Fed. Reg. at 37,057; Connectivity Report, AR 11691. The Agencies also relied on independent review of the Connectivity Report by an expert panel of EPA's Science Advisory Board (Science Board). *Id.*

Utilizing their "technical expertise and practical experience in implementing the CWA [for] over 40 years," in 2015 the Agencies established "jurisdictional categories reflect[ing] the current state of the best available science [and] . . . based upon the law and Supreme Court

decisions." *Id*. In addition to traditionally navigable waters, interstate waters, and the territorial seas,[3] the 2015 Rule defined "waters of the United States" to cover: (1) non-navigable tributaries to covered waters, including ephemeral streams, defining "tributary" as a water with sufficient volume, frequency, and duration of flow to create the physical indicators of a bed and banks and an ordinary high-water mark; (2) wetlands adjacent to otherwise covered waters, defining "adjacent" as bordering, contiguous or neighboring, including wetlands with connections to other waters through either surface water or "shallow subsurface water and groundwater flows"; and (3) other waters based on case-specific significant nexus analyses. 80 Fed. Reg. at 37,104-06. The Agencies determined that all these waters "require[d] protection in order to restore and maintain the chemical, physical or biological integrity of traditional navigable waters, interstate waters, and the territorial seas." *Id*. at 37,055.

In 2015, the Agencies recognized that connections between waters "occur on a continuum or gradient," *Id.* at 37,057, and made findings about those connections by considering the Act's language and purpose, the significant nexus standard, and the best available science. The Agencies "characterize[d] the nature and strength of the chemical, physical, and biological connections between upstream and downstream waters" by "identify[ing] the functions that waters provide that can significantly affect the chemical, physical, or biological integrity" of downstream waters. *Id.* at 37,057; *see id.* at 37,067. Critically, the Agencies found that the effects of upstream waters on downstream water integrity are cumulative, resulting from "the accumulative contribution of similar waters in the same watershed and . . . their functions considered over time." *Id.* at 37,057; *see id.* at 37,063. And the Agencies concluded that "[w]hen considering the effect of an individual stream or wetland, all contributions and functions of that stream or wetland should be evaluated cumulatively." *Id.* at 37,064.

Applying accepted scientific principles, the Agencies found in the 2015 Clean Water Rule that tributaries, "including . . . ephemeral streams" are "waters of the United States" because "they significantly affect the chemical, physical, or biological integrity" of downstream waters and are therefore "vital" to downstream water integrity. *Id*. at 37,063, 37,066, 37,068. In particular, the

[3] The definition also included impoundments of these waters. 80 Fed. Reg. at 37,104.

Agencies explained that ephemeral streams protect the chemical integrity of downstream waters by trapping and removing harmful chemical substances through absorption to stream sediments, and transformation and export of nutrients and carbon to downstream waters. *See id.* at 37,068-69. Ephemeral streams protect the physical integrity of downstream waters by transporting water downstream "into local storage compartments such as ponds, shallow aquifers . . . and regional and alluvial aquifers . . . that are important sources of water for maintaining baseflow in rivers," *id.* at 37,063; by transporting sediments, organic matter, and organisms to downstream waters; and by retaining and attenuating floodwaters. *See id*. at 37,068-69. Further, ephemeral streams protect downstream waters by performing biological functions that "are critical in the life-cycles of many organisms capable of moving throughout river networks." *Id.* at 37,069. Notably, ephemeral streams are necessary to the dispersal and migration of amphibians, plants, microorganisms, and invertebrates as well as to providing food, habitat and refuge for numerous species of fish and wildlife such as salmon populations. *Id.* at 37,063, 37,069.

The Agencies also determined in the 2015 Clean Water Rule that wetlands within 100 feet of a protected water or within the 100-year floodplain of a protected water, out to a distance of 1,500 feet, are "adjacent" waters and "waters of the United States." *Id*. at 37,085-86. The Agencies concluded that these wetlands require the Act's protection because they are "integrated with rivers via functions that improve downstream water quality." *Id.* at 37,063. The Agencies identified multiple important chemical, physical, and biological functions performed by these adjacent wetlands. *Id*. at 37,085-86. Critically, the Agencies recognized that the functional connections between wetlands and downstream waters include physical connections both "through surface water" and through "shallow subsurface water and groundwater flows," as well as "biological and chemical connections." *Id*. at 37,063.

For example, floodplain wetlands promote chemical integrity of waters through processes such as "assimilation, transformation and sequestration of pollutants, including excess nutrients and chemical contaminants such as pesticides and metals that can degrade downstream water integrity." *Id*. at 37,063. The Agencies found that floodplain wetlands protect the physical integrity of downstream waters through functions including "temporary storage of local

groundwater . . . releasing (desynchronizing) floodwaters, and containing large volumes of stormwater, sediment, and contaminants in runoff that could otherwise negatively affect the condition or function of downstream waters." *Id*. And the Agencies determined that wetlands perform biological functions that are key to downstream water quality, by serving as "integral components of river food webs," and "providing nursery habitat for breeding fish and amphibians, colonization opportunities for stream invertebrates, and . . . exchange of organic matter and organisms . . . that are critical to river ecosystem function." *Id.*

In addition, the Agencies concluded that "waters of the United States" could properly encompass more distant non-floodplain wetlands and open waters (such as vernal pools) based on a case-by-case significant nexus analysis because of their "numerous functions that benefit downstream water integrity." *Id*.; *see id*. at 37,086-91.

The 2015 Rule was stayed nationwide by the Sixth Circuit until the Supreme Court reversed that court's judgment for lack of jurisdiction. *See Nat'l Ass'n of Mfrs. v. DOD,* 138 S. Ct. 617 (2018). During the stay the Agencies applied the 1980s definition and the *Rapanos* Guidance to determine the jurisdictional status of waters. 84 Fed. Reg. 56,626, 56,630 (Oct. 22, 2019).

E. The 2019 Rule

On October 22, 2019, the Agencies replaced the 2015 Clean Water Rule with the 2019 Rule, which reinstated a definition identical to the 1980s definition while advising that the 2019 Rule would be implemented in accordance with the *SWANCC* and *Rapanos* guidances. 84 Fed. Reg. at 56,626. The Agencies did not supplement or change their detailed factual findings in the 2015 Rule because they did "not intend to engage in substantive reevaluation of the definition of 'waters of the United States.'" 82 Fed. Reg. 34,899, 34,903 (July 27, 2017).

III. THE 2020 RULE

The 2020 Rule continues to define "waters of the United States" to include traditionally navigable waters and the territorial seas, but excludes many of the non-navigable tributaries and wetlands that have been protected under every prior rule and guidance. By the Agencies' own estimates, the Rule excludes from the Act's protections 18% of the nation's streams (more than a third of streams in the arid west) and over 50% of the nation's wetlands. AR 11767 at 2-4, 9. The

Rule also, for the first time in the history of the Agencies' interpretation of "waters of the United States," excludes interstate waters as an independent category of jurisdictional waters.

Ephemeral streams. The 2020 Rule expressly excludes "ephemeral" streams from the scope of protected waters, defining "ephemeral" as "surface water flowing or pooling only in direct response to precipitation (e.g., rain or snowfall)." 85 Fed. Reg. at 22,338. The Agencies received numerous comments – including from scientific organizations, government agencies, and environmental experts and advocates – identifying the chemical, physical, and biological connections between ephemeral streams and downstream waters and the importance of ephemeral streams for restoring and maintaining downstream waters' integrity.[4]

The Agencies claimed that the 2020 Rule's categorical exclusion of ephemeral streams from "waters of the United States" was justified by a "connectivity gradient," 85 Fed. Reg. at 22,288, asserting that the Connectivity Report and the Science Board supported this conclusion by recognizing that the connections between waters vary in degree based on multiple factors. AR 386 at 64-65 (enumerated as 53-54). However, there is nothing in the Connectivity Report or the Science Board's review of it stating that ephemeral streams should be excluded based on the connectivity gradient. Instead, the Connectivity Report and the Science Board stressed the important functional connections of ephemeral streams to downstream waters, and the significant cumulative impacts that the abundant numbers of ephemeral streams have on downstream waters' integrity. *See* Connectivity Report, AR 11691 at 26-27, 46-47, 113-114 (enumerated as ES-5 to ES-6, 1-10 to 1-11, 3-7 to 3-8); Science Board Review, AR 386 at 22, 25, 33-34 (enumerated as 11, 14, 22-23). As the record shows, the Science Board and its members determined that the Agencies ignored the actual conclusions of the Connectivity Report and misrepresented both the

[4] *See*, *e.g.*, Society for Freshwater Science, AR 8909 at 5; American Society of Ichthyologists and Herpetologists, AR 4275 at 1; 10,000 Years Institute, AR 10975 at 1; Alliance for the Great Lakes, et al., AR 5131 at 2; New England Interstate Water Pollution Control Commission, AR 4875 at 5; The Nature Conservancy, AR 5061 at 2; Mississippi River Network, AR 5454 at 5; Maine Association of Wetland Scientists, AR 4389 at 2; Laura S. Craig, PhD, Director of Science and Economics, American Rivers, et al., AR 4909 at 2; Washington State Department of Ecology, et al., AR 4733 at 1; Maryland Department of the Environment, AR 4901 at 3-4; California State Water Resources Control Board, AR 5198 at 2-5; Wisconsin Department of Natural Resources, AR 5304 at 1; Alaska Chapter of the Society of Wetland Scientists, AR 11015 at 1; North Carolina Environmental Restoration Association, AR 3701 at 3; Arizona Riparian Council, AR 9033; Defenders of Wildlife, AR 4346 at 2, 9.

Science Board's review and the Connectivity Report's explanation of the import of the connectivity gradient. *See* AR 3825 at 2-3; AR 8909 at 5; AR 3291 at 9; AR 11589, Attachment 1. Similarly, the record includes multiple comments explaining that the functions of individual streams and wetlands are cumulative across entire watersheds and must be evaluated collectively in order to accurately assess their contributions to and effects on downstream waters' integrity.[5]

Wetlands. The Rule includes only those wetlands that qualify as "adjacent wetlands," defined as wetlands either touching another covered water or inundated by flooding from another covered water in a typical year.[6] 85 Fed. Reg. at 22,338. Thus, the Rule excludes most wetlands that do not touch or otherwise have a surface water connection to other covered waters.

The Agencies received numerous comments from professional and scientific organizations, government agencies, and environmental research and advocacy organizations detailing the importance of wetlands to downstream water quality. Echoing the Agencies' own prior findings, these commenters pointed out that wetlands, including those without a direct surface water connection to other waters, perform multiple chemical, physical, and biological functions that are vital for restoring and maintaining downstream waters' integrity.[7]

The "typical year" requirement. The 2020 Rule includes non-navigable tributaries only if they carry perennial or intermittent flows to otherwise covered waters in a "typical year." 85 Fed. Reg. at 22,286. Similarly, to be "waters of the United States" under the Rule, wetlands must generally have a surface water connection to jurisdictional waters in a "typical year." *See id.* at

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[5] *See*, *e.g.*, Delaware Riverkeeper Network, AR 4736 at 7-8; Wisconsin Wetlands Association, AR 5064 at 1; Society for Freshwater Science, AR 8909 at 3; The Nature Conservancy, AR 5061 at 5-6; Society of Wetland Scientists, AR 4466 at 20; Natural Resources Defense Council, et al., AR 7673 at 24.

[6] The 2020 Rule provides that wetlands remain adjacent when they are physically separated from a jurisdictional water by a natural barrier, or by an artificial barrier that allows for a direct hydrologic surface connection in a typical year. *See* 85 Fed. Reg. at 22,338. By imposing a direct surface connection requirement for artificial barriers, the Rule protects fewer waters than the Agencies' previous adjacency provisions in the 1980s definition, the *Rapanos Guidance*, and the 2015 Clean Water Rule. *Cf. Rapanos* Guidance, AR 11695 at 5; 80 Fed. Reg. at 37,105.

[7] *See*, *e.g.*, Society of Wetland Scientists, AR 4466 at 9, 10, 13, 16; American Fisheries Society, et al., AR 6851 at 2; Delaware Ornithological Society, AR 4414 at 2; National Wildlife Federation, AR 6880 at 27; California State Water Resources Control Board, AR 5198 at 4; Society for Freshwater Science, AR 8909 at 3, 8; Natural Resources Defense Council, AR 7673 at 22; Ohio Wetlands Association, AR 4879 at 2; Waterkeeper Alliance, et al., AR 11318 at 67.

22,274. "Typical year" is defined as "when precipitation and other climatic variables are within the normal periodic range . . . for the geographic area of the applicable aquatic resource based on a rolling thirty-year period." *Id.* at 22,339.

Numerous professional and scientific organizations, government agencies, academic experts, and environmental advocates submitted comments showing that the Rule's typical year requirement diverges from actual present-day hydrological conditions that are driven by the profound and accelerating shifts resulting from climate change. Those commenters explained that the Rule's retrospective typical year requirement (looking to the previous 30 years) fails to account for ongoing changes in precipitation, increased storm intensity, and altered hydrologic patterns of streams and wetlands that are apparent and intensified by climate change.[8] In addition, commenters explained that climate change is reducing overall stream flow, that this reduction in stream flow will occur at a quickly increasing rate, and that this will convert a significant number of perennial and intermittent streams into ephemeral streams that are left unprotected by the Rule. *See*, *e.g.*, AR 7628 at 15; AR 1715 at 2; AR 4343 at 19, 21, 29-30; *see also* Dkt. No. 30-18 ¶ 4.

The 2020 Rule's definition of tributary based on stream flow in a "typical year"[9] also disregards the Agencies' prior findings that a tributary is best evidenced by the well-recognized physical indicators of a bed and bank and ordinary high-water mark.[10]

Resource and Programmatic Assessment and Economic Analysis. The Agencies asserted that they analyzed the effects and impacts of the 2020 Rule on water quality by preparing a "Resource and Programmatic Assessment" (RPA) and an "Economic Analysis" (EA). *See* 85 Fed.

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[8] *See*, *e.g.*, American Fisheries Society, et al., AR 4256 at 3; The Nature Conservancy, AR 5061 at 19-20; North Carolina Association of Environmental Professionals, AR 5435, Attachment 2 at 1; American Rivers, AR 5108 at 2; New England Interstate Water Pollution Control Commission, AR 4875 at 3; Mississippi River Network, AR 5454 at 5; Maine Association of Wetland Scientists, AR 4389 at 3; Association of California Water Agencies, AR 4280 at 5; California State Water Resources Control Board, AR 5198 at 6; Natural Resources Defense Council, AR 7673 at 13, 15-19; Environmental Law and Policy Center, et al., AR 5453 at 5.

[9] The Agencies provide a long list of tools and methods to determine whether a stream is intermittent or ephemeral in a "typical year," but do not explain or specify how or whether any of them should be used and do not provide an objective methodology to make such a determination. *See* 85 Fed. Reg. at 22,292-94. Similarly, the Agencies do not explain or specify the "other climatic variables" or "geographic area" components of the typical year definition.

[10] *See* U.S. EPA, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (2015 TSD) at 235-43, AR 11395, Attachment F-9.

Reg. at 22,331. But when issuing the Rule, the Agencies expressly disavowed the RPA and EA as bases for the Rule. *Id.* at 22,332 ("the final rule is not based on the information in the agencies [EA] or [RPA]"), 22,335; EA, AR 11572 at 12 (enumerated as xi); RPA, AR 11573 at 8 (enumerated as 6). By their own admission, the Agencies' reworking of the scope of the Act is not tethered to any findings about the effects and likely consequences of the Rule on Act's objective to protect and restore the quality and integrity of waters nationwide.

The RPA and EA illustrate how the Rule's severe reduction in covered waters results in increased water pollution. Acknowledging the breadth of the Rule's impacts, the RPA observed that "many CWA programs—including water quality standards, state and tribal [Section] 401 certification programs, and oil spill prevention and planning programs—apply only to waters subject to CWA jurisdiction." RPA, AR 11573 at 61 (enumerated as 59).

The essential characteristics of the 2020 Rule are based not on an application of scientific principles or a consideration of harms to impacted waters, but instead on a "unifying legal theory for federal jurisdiction over those waters and wetlands that maintain a sufficient surface water connection to traditional navigable waters or the territorial seas." 85 Fed. Reg. at 22,252. The Rule's exclusion of non-navigable waters—including streams and wetlands—that lack a specific surface water connection to other jurisdictional waters is drawn directly from the *Rapanos* plurality opinion that commanded only a minority of the Justices of the Supreme Court. *See, e.g.*, 85 Fed. Reg. at 22,273 (citing "plurality decision in *Rapanos*" for "specific surface water connection" requirement); *id.* at 22,289 ("the requirement that a tributary be perennial or intermittent . . . reflects the [*Rapanos*] plurality's" opinion); *see also id*. at 22,266, 22,278-79, 22,309 (same). According to the Agencies, adopting this legal approach "balance[s]" the CWA's water quality objective with the rights of states, *id*. at 22,252, recognizes the Act's "non-regulatory" provisions, *id*. at 22,269, and "avoid[s] . . . constitutional questions," *id*. at 22,291.

STANDARD OF REVIEW

The Administrative Procedure Act (APA) authorizes a court to "hold unlawful and set aside agency actions, findings and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Because this is "a

case involving review of a final agency action under the APA, . . . the genuine dispute of material fact standard for summary judgment normally is inapplicable." *California v. U.S. Dep't of the Interior*, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019) (quotation marks and citation omitted). Rather, "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did," *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 770 (9th Cir. 1985), and the agency action is "otherwise consistent with the APA standard of review." *San Joaquin River Grp. Auth. v. Nat'l Marine Fisheries Serv.*, 819 F. Supp. 2d 1077, 1084 (E.D. Cal. 2011) (quotation marks omitted).

Courts apply two distinct standards under the APA: one standard evaluates the rationality of the agency's decisionmaking process and a second standard tests the reasonableness of the agency's interpretation of the statute implemented by the regulation. *See Altera*, 926 F.3d at 1075 (citation omitted). To be valid, an agency interpretation must meet both of these standards.

First, an agency's decisionmaking is unlawful under *State Farm* if, among other things, the agency fails to examine important factors or relevant data. 463 U.S. at 43. An agency must "consider all relevant factors and offer an explanation for its conclusion that is grounded in the evidence." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 998 (9th Cir. 2014) (citing *State Farm*). An agency's decisionmaking also is flawed if the agency disregards or countermands its earlier factual findings without a reasoned explanation, "even when reversing a policy after an election," and that explanation must be "more substantial" when the agency's decision "rests on factual findings contradicting those" made previously. *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 967-68 (9th Cir. 2015); *see also Fox*, 556 U.S. at 538. An agency issuing a rule that abandons prior policy or practice must also take into account the "serious reliance interests" engendered by the agency's prior position. *Encino Motorcars*, 136 S. Ct. at 2126.

Second, an agency's interpretation of ambiguous statutory language is unlawful under *Chevron* if it is not based on a "permissible" construction of the statute, which "is examined in light of the statute's text, structure and purpose." *Altera*, 926 F.3d at 1076; *see also Chevron*, 467 U.S. at 843. Impermissible agency statutory interpretations include those that are "unmoored from

the purposes and concerns of the underlying statutory regime," *Altera*, 926 F.3d at 1076 (citations omitted), or are "arbitrary or capricious in substance," *Mayo Found. for Med. Ed. & Research v. United States*, 562 U.S. 44, 53 (2011) (citation omitted).

ARGUMENT

The 2020 Rule removes the Act's longstanding protections for vast numbers of diverse and important streams and wetlands nationwide and will result in increased pollution and harm to the integrity of downstream waters—including harm to drinking water and wildlife and increased risk of flooding of property owned by the States and Cities. As explained below in Section I, the Rule should be vacated because the Agencies' decisionmaking is flawed under *State Farm*, *Fox*, and *Encino Motorcars.* As explained below in Section II, the Rule also should be vacated because the Agencies' interpretation of the Act is unreasonable under *Chevron.* And as explained below in Section III, the States and Cities have standing to challenge the Rule.

I. THE AGENCIES' DECISIONMAKING WAS ARBITRARY AND CAPRICIOUS

The decisionmaking process for the 2020 Rule was arbitrary and capricious in three ways. First, contrary to the Agencies' claim that they redefined "waters of the United States" based on the Act's objective, 85 Fed. Reg. at 22,250, the Agencies in fact do not give meaningful consideration to that objective—"to restore and maintain the integrity of the nation's waters"—and fail to provide reasoned explanation for their conclusion that the Rule's new exclusions would further the Act's objective. The Agencies also entirely disregard the factual findings they made in 2015 regarding the impacts of those now excluded waters on downstream water quality. The Rule's "typical year" requirement similarly fails to meet the requirements for reasoned agency rulemaking because it limits protections for wetlands and streams impacting downstream waters in conflict with the Act's objective, and is vague and uncertain.

Second, while the Agencies claim they considered one of the Act's policies regarding "the primary responsibilities and rights of States," *see id.* at 22,252, 33 U.S.C. § 1251(b), they simply repeat the statutory phrase without explanation or analysis of how the 2020 Rule's exclusion of waters from the Act's protections serves that policy.

Third, the Agencies entirely fail to consider the States' and Cities' reliance interests

engendered by the prior, decades-long definition of "waters of the United States."

A. The Agencies Did Not Examine or Explain Whether and How the 2020 Rule's Narrower Definition of "Waters of the United States" Meets the Act's Objective.

An agency's decisionmaking process is arbitrary and capricious when the agency has "failed to consider an important aspect of the problem" or failed to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (quotation marks and citations omitted). In explaining the basis for the 2020 Rule, the Agencies state that the Act's objective of maintaining and restoring the integrity of the Nation's waters is an important aspect of defining "waters of the United States." Despite asserting that they took water quality into account, the Agencies in fact entirely disregarded their own analysis of the water quality impacts of the 2020 Rule. The Agencies also make unexplained and unsupported assertions that their prior analyses of water quality impacts now show that ephemeral streams and wetlands without surface connections to navigable waters should be excluded from "waters of the United States."

Although the Agencies conducted assessments of the water quality impacts of the 2020 Rule, they then chose not to rely on those assessments in their decisionmaking. In response to public comments, the Agencies state that they assessed the impacts in their RPA and EA (AR 11574, Topic 1 at 112-13), but ignore the ways in which those assessments fatally undermine the Rule when they flatly declare that "the final rule is not based on" and "the agencies are not relying on" either the EA or the RPA. 85 Fed. Reg. at 22,332, 22,335. Because those impact assessments consider the Rule's consequences for water quality, the Agencies refusal to rely on them is a concession that the Rule's large reduction in the scope of water quality protection under the Act was adopted with in explicit disregard for the foundational purpose of the Act. And having disclaimed reliance on those impact assessments in the Rule, the Agencies cannot now use them—or selected excerpts from them—to justify the Rule. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (*DACA*) ("It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'") (quoting *Michigan v. EPA*, 576 U.S. 743, 758-60 (2015)).

It is unsurprising that the Agencies disclaim reliance on the RPA and the EA because those assessments show that removing all ephemeral streams and many wetlands from the Act's jurisdiction will in fact harm downstream water quality by causing greater pollutant loads, increased oil spill risks, degraded aquatic habitats, and negative effects on drinking water intakes. AR 11572 at 129 (enumerated as 105). The assessments also show that, as a result of the exclusion of those waters, states will no longer have the authority to review and certify projects that require federal permits and may discharge into those waters, *see* 33 U.S.C. 1341, nor be required to impose water quality standards, and measures to meet them, on those waters, *see id.* § 1313, "result[ing] in reduced protection for aquatic ecosystems." RPA, AR 11573 at 64 (enumerated as 62). The assessments further demonstrate that the exclusion of previously protected waters will result in elimination of oil spill prevention and preparedness requirements. *See id.* § 1321(b); RPA, AR 11573 at 61, 64-66, 72-74 (enumerated as 59, 62-64, 70-72).

Once the Agencies chose to dispense with the only assessments that addressed the 2020 Rule's effects on water quality and the Rule's ability to achieve the Act's keystone objective, the only analyses of water quality impacts left are the analyses they relied on for the 2015 Rule: namely, the Connectivity Report and the Science Board's analysis of that report. Those analyses, however, unequivocally demonstrate that ephemeral streams and wetlands without surface water connections to other waters have significant water quality impacts on downstream waters. See Connectivity Report, AR 11691 (as cited in Background, Section III); Science Board Review, AR 386 (same). Yet the Agencies forged ahead with the exclusion of those waters in the 2020 Rule, claiming without explanation or support that those exclusions were based on "science." 85 Fed. Reg. at 22,288, 22,310. In that process, the Agencies ignored not only the requirements of *State Farm* but also of *Fox*, which holds that an agency's decision is arbitrary and capricious if it fails to address the agency's prior factual findings. *See* 556 U.S. at 538.

By failing to meaningfully consider—and actually harming—the quality of the Nation's waters, the Agencies in the 2020 Rule have acted irrationally because "[r]ational decision making also dictates that the agency simply cannot employ means that actually undercut its own purported goals." *Office of Commc'n of the United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir.

1985). The Rule is arbitrary and capricious because it is "contrary to Congress's purpose in enacting" the Act. *Ctr. for Biological Diversity v. NHTSA*, 538 F.3d 1172, 1197 (9th Cir. 2008); *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 158 (3d Cir. 2004) (holding agency interpretation arbitrary where it "frustrates the regulatory goal").

1. The Agencies' Decision to Exclude All Ephemeral Streams Was Arbitrary and Capricious.

Rather than explaining how excluding ephemeral streams is consistent with the Act's objective, the Agencies offer mere conclusions and fail to acknowledge their prior findings. The Agencies claim that the 2020 Rule's exclusion of ephemeral streams "relied on the available science" and "rests upon a reasonable inference of ecological interconnection" with navigable waters. 85 Fed. Reg. at 22,288, 22,310. But they offer nothing by way of explanation or support for that "inference." Moreover, the "available science" is the Connectivity Report and the Science Board's review of it, which both contradict any inference that ephemeral streams are categorically not important for restoring or maintaining downstream water quality. Indeed, the Connectivity Report clearly shows that ephemeral streams perform multiple chemical, physical, and biological functions that are vital to protecting the quality and integrity of traditional navigable waters. *See* Connectivity Report, AR 11691 at 26-27, 46-47, 113-114 (enumerated as ES-5 to ES-6, 1-10 to 1-11, 3-7 to 3-8); Science Board Review, AR 386 at 22, 25, 33-34 (enumerated as 11, 14, 22-23). As discussed above (pp. 8-11), the Agencies made findings regarding these important connections between ephemeral streams and downstream waters in 2015, which they now fail to acknowledge. Thus, the Agencies' decision to categorically exclude ephemeral streams is not supported by either a reasoned explanation or relevant data, as required by *State Farm*, nor does it address the Agencies' prior findings, as required by *Fox*. Indeed, their conclusion is "flatly contradicted by the agenc[ies'] own record." *See Kansas City v. Dep't of Housing & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) (citing *State Farm*, 463 U.S. at 43).

The Agencies also assert that their decision to exclude all ephemeral streams from the Act's protections is supported by the "connectivity gradient," 85 Fed. Reg. at 22,288, a common-sense concept that the connections between waters vary in degree based on multiple factors as

recognized by the Agencies in 2015. *See* 80 Fed. Reg. at 37,057. But the Agencies offer only their conclusion that the connectivity gradient provides a scientific basis for the exclusion of ephemeral streams; there is no explanation or basis in the record that shows how the "connectivity gradient" in fact supports the Agencies' categorical exclusion. Quite the contrary, the Connectivity Report and the Science Board's review explain that the connectivity gradient does not support removal of CWA protections for the waters excluded by the 2020 Rule and instead demonstrates that non-navigable waters that flow infrequently can have significant impact on the integrity of downstream waters. The Connectivity Report found that "the evidence for connectivity and downstream effects of ephemeral streams was strong and compelling." AR 11691 at ES-7. And the Science Board's review found that "[i]mportant cumulative effects are exemplified by ephemeral flows in arid landscapes, low frequency events that may nevertheless provide most of the subsidies to downgradient waters," AR 386 at 33 (enumerated as 22), and emphasized "[t]he importance of considering waterbodies in the aggregate," including ephemeral streams, "for evaluations of connectivity," *id*. at 22 (enumerated as 11). Indeed, Science Board members who reviewed the Connectivity Report in 2015 commented that the Agencies' 2020 Rule "ignores or misrepresents much of the Connectivity Report and subsequent Science Board Review," "misrepresents" the Science Board's hypothetical illustration of the connectivity gradient, and "arrives at an erroneous conclusion" that is "not supported by the science, and opposite the intent of the [Science Board]." AR 3825 at 2-3. In the 2020 Rule, the Agencies provide no cogent reason to dismiss those pointed, authoritative rebukes of their attempt to rely on this prior scientific work, and that fact is fatal to their effort to defend the Rule now.

The Rule's exclusion of ephemeral streams also disregards the Agencies' prior factual findings that ephemeral streams with a bed, banks, and an ordinary high-water mark significantly affect the chemical, physical, and biological integrity of downstream navigable waters and should be included within the scope of "waters of the United States." *See* 80 Fed. Reg. at 37,068-69, 37,079. The Agencies previously found that tributaries, including upstream ephemeral waters, "are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." 2015 TSD,

AR 11395, Attachment F-9 at 71 (enumerated as 70), citing *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring). But in the 2020 Rule the Agencies assert, without any basis in fact, the exact opposite: all ephemeral streams categorically *lack* sufficient connection to navigable waters, 85 Fed. Reg. at 22,288, and are *not* "significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system." *Id*. at 22,310. Because the Agencies have failed to provide a "reasoned explanation" for these new contradictory findings that disregard their prior findings, the Rule is arbitrary and capricious. *See Fox*, 556 U.S. at 516, 537.

2. The Agencies' Decision to Exclude Wetlands Without Direct Surface Water Connection Is Arbitrary and Capricious.

The Agencies' explanation of why they excluded wetlands without direct surface connections to other waters from their redefinition of "waters of the United States" fares even worse. Although the Agencies assert that the redefinition "achieves the goals of the Act," 85 Fed. Reg. at 22,314, their explanation regarding the wetlands covered by the 2020 Rule does not mention, much less meaningfully consider, the impacts to downstream water quality that will result from the lack of protections for newly-excluded wetlands. *See id*. at 22,306-22,317.

Here, again, the Agencies claim that their decision to redefine adjacent wetlands covered by the Act was "informed by science." *Id.* at 22,314. But while they refer to statements in the Connectivity Report and the Science Board Review that wetlands closer to streams have a greater impact on streams, they fail to provide any explanation of how they concluded that some wetlands should be excluded. *See id.* Moreover, the Science Board in its official capacity, and its members separately and in their professional capacities, have stated that the Agencies' line-drawing with respect to wetlands "departs from established science," AR 11589, Attachment 1 at 3, and disregards "[m]ultiple lines of evidence point[ing] to the importance of chemical and biological connectivity between wetlands and downstream waters." AR 3825 at 5.

In violation of the requirements of *Fox*, the Agencies disregard *all* of their prior findings, discussed above (pp. 8-11), about the importance of shallow subsurface and groundwater connections between wetlands and downstream waters. AR 3825 at 5-6. Those findings show that

the wetlands excluded by the Rule perform functions essential to maintaining the integrity of traditional navigable waters, such as trapping pollutants, preventing flooding, and providing habitat for numerous species. *See*, *e.g.*, Connectivity Report, AR 11691 at 23-25 (enumerated as ES-2 to ES-4). Indeed, the Agencies expressly found in 2015 that wetlands with "regular shallow subsurface-water connection" to downstream waters "clearly affect" these waters, and "floodplain wetlands are highly connected to streams and rivers through . . . shallow groundwater." *Id.* at 24, 192 (enumerated as ES-3, 4-39). Because the Agencies "offer no new information or data to justify [their] contrary finding" that CWA protection is *un*necessary for the excluded wetlands, the Rule is arbitrary and capricious. *Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, 463 F. Supp. 3d 1011, 1020 (D. Alaska 2020).

In promulgating the 2020 Rule, the Agencies received numerous substantive public comments detailing wetlands' many vital functions that impact downstream water integrity, the similar functions performed by ephemeral streams, and the cumulative downstream effects of both types of waters. *See* pp. 11-15, *supra*. Despite the "[v]oluminous evidence support[ing] the commenters' view," the Agencies have "waved away those commenters' concerns and their supporting evidence in a few sentences of defective argument." *Dist. of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 23 (D.D.C. 2020). The Agencies do not respond to these comments and merely offer the conclusory phrase that the Rule was "informed by science" and repeat dozens of times that "science cannot dictate where to draw the line between federal and state or tribal waters, as those are legal definitions." *See, e.g.*, Response to Comments, AR 11574, Topic 1 at 16, 40, 67, 115, 127, 134, 137; Topic 3 at 12; Topic 4 at 10; Topic 5 at 9; Topic 6 at 5; Topic 7 at 11; Topic 8 at 12, 14, 42; Topic 10 at 3, 22; Topic 11 at 33, 41, 74, 114; Topic 13 at 1, 8, 13; *see also* 85 Fed. Reg. at 22,261, 22,271, 22,288, 22,308 (same). Simply "[n]odding to the concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking." *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020). Importantly, as discussed by the Supreme Court in *SWANCC*, *Riverside Bayview*, and *Rapanos*, and consistent with the Act's text, purpose and intent, science is an essential factor in the Agencies' interpretation of the scope of "waters of the United States." *See* pp. 6-7, *supra.* Rather than meaningfully considering

significant comments and extensive record evidence about the importance to downstream water quality of the many wetlands and other waters the Rule excludes from the Act's protections, the Agencies arbitrarily and capriciously "brushed aside critical facts" with conclusory responses. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017).

3. The "Typical Year" Requirement Is Arbitrary and Capricious.

The 2020 Rule's requirement that "waters of the United States" have a surface water connection to another protected water in a "typical year" is arbitrary and capricious. The typical year requirement excludes from the Act's protections waters that are essential to restore and maintain downstream waters' integrity and is contrary to the evidence before the Agencies. Purporting to encompass "times when it is not too wet and not too dry," 85 Fed. Reg. at 22,274, the Agencies offer no factual support for the limiting principle they have selected. By focusing on the preceding thirty-year period, the "typical year" requirement ignores significant comments and evidence about the substantial connectivity between waters during what are increasingly atypical years (when compared to 30 years of historical data) resulting from climate change. *See* pp. 13-14, *supra*. Wetlands that would otherwise function to trap pollutants and mitigate downstream flooding, regardless of their surface water connection in a typical year, will lose protection because of this arbitrary requirement. *See* AR 4389 at 3; AR 5061 at 19; AR 5126 at 4-5; *see also* Dkt. No. 30-22 at 10-13; Dkt. No. 30-15 at 12-13. The Rule also fails to explain the meaning of the "other climatic variables" and "geographic area" components of the typical year definition, 85 Fed. Reg. at 22,341, leaving identification of protected waters subject to "vague and uncertain analysis." *Ocean Advocates v. U.S. Army Corps of Eng'rs,* 402 F.3d 846, 869 (9th Cir. 2005). The Agencies thus have failed to "articulate a satisfactory explanation for [their] action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43.

B. The Agencies Fail to Examine or Explain How the 2020 Rule's Narrower Definition of "Waters of the United States" Is Consistent with CWA's Policy Regarding the Responsibilities and Rights of States.

The Agencies claim that they balanced the CWA's objective against the Act's policy to preserve and protect the "responsibilities and rights of states to prevent, reduce, and eliminate pollution." *See* 85 Fed. Reg. at 22,252, citing 33 U.S.C. § 1251(b). As explained below (pp. 33-

38, *infra*), the policy cannot bear the weight the Agencies place on it: the policy reflects Congress's intent that the states, rather than EPA, implement the Act's permitting programs and thus does not provide any textual basis for narrowing the scope of "waters of the United States" in deference to state-only regulation. But even if the policy were an appropriate basis for excluding some waters from "waters of the United States," the Agencies do nothing more than invoke the policy as a basis for narrowing the definition of "waters of the United States." *See, e.g.,* 85 Fed. Reg at 22,250, 22,269, 22,273, 22,296. They offer no analysis or explanation of whether or how excluding interstate waters as an independent category, as well as ephemeral streams and wetlands without surface water connections, preserves or protects the "responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. §1251(b).

Because the Agencies fail to analyze and explain how the redefinition of "waters of the United States" impacts the CWA's policy regarding state rights and responsibilities, the Rule is arbitrary and capricious under *State Farm*.

C. The 2020 Rule Is Arbitrary and Capricious Because the Agencies Fail to Consider the States' and Cities' Reliance Interests.

"When an agency changes course . . . it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" *DACA*, 140 S. Ct. at 1913 (quoting *Encino Motorcars*; internal quotation marks omitted); *see also California v. Azar*, 950 F.3d 1067, 1113 (9th Cir. 2020). In particular, an agency revising its prior policy is "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *DACA*, 140 S. Ct. at 1915.

The Agencies entirely fail to assess whether states have reliance interests in the prior definitions of "waters of the United States" and then weigh those interests against the other factors the Agencies considered in deciding to change their longstanding policy. As explained above (pp. 11-15, *supra*), the 2020 Rule excludes (1) all ephemeral streams and any other streams that do not contribute flow to a covered water in a "typical year"; (2) many wetlands that do not have a surface water connection to another covered water; and (3) interstate waters as an independent category. In contrast, the 1980s regulations defined "waters of the United States" broadly and the

2008 *Rapanos* Guidance explained that the 1980s definition includes (1) ephemeral streams with a "significant nexus" to traditionally navigable waters; (2) wetlands with a shallow subsurface connection to traditionally navigable waters; and (3) all interstate waters. *Rapanos* Guidance, AR 11695 at 4-11. The 2015 Rule confirmed that "waters of the United States" include (1) ephemeral streams with bed and banks and ordinary high-water marks; (2) wetlands with important functional connections to covered waters other than surface water connections; and (3) all interstate waters. 80 Fed. Reg. at 37,055, 37,068, 37,079, 37,080-81. The 2019 Rule returned to the 1980s regulations and the *Rapanos* Guidance. 84 Fed. Reg. at 56,626.

The States and Cities have relied on those earlier definitions to structure their water quality protection programs and safeguard their waters.[11] AR 5126 at 2, 7-8; AR 5467 at 42, 44, 46-48, 50, 58-59, 68, 89, 93, 95, 97, 100, 102; AR 11442, Comment at 7-14; AR 4820 at 15-16; AR 4528 at 3. Many states did not seek authorization to administer the Section 404 dredge and fill permitting program and decided not to develop their own dredge and fill programs or point source programs because they relied on long-standing federal protections. AR 5126 at 7-8; AR 5467 at 58-59, 68, 89, 93, 95, 97, 100, 102; AR 11442, Comment at 7-14; AR 4820 at 15-16; AR 4528 at 3. The 2020 Rule upends longstanding state regulatory programs, increases state administrative costs and burdens, threatens to profoundly damage state property, and drastically reduces federal water quality protections. *Id.*; *see* Argument, Section III, *infra*.

In response to comments regarding states' reliance interests, the Agencies take the position that the states did not have reliance interests in the 2015 Rule because it was the subject of

[11] Dkt. No. 30-17 ¶¶ 14, 25, 34; Declaration of Roy A. Jacobson Jr. in Support of Plaintiffs' Motion for Summary Judgment (Jacobson Decl.) ¶ 8; Declaration of Daniel Zarrili in Support of Plaintiffs' Motion for Summary Judgment (Zarrilli Decl.) ¶ 2; Dkt. No. 30-14 ¶ 7; Declaration of Steve Mrazik in Support of Plaintiffs' Motion for Summary Judgment (Mrazik Decl.) ¶ 5; Dkt. No. 30-5 ¶ 16; Declaration of Jeffrey Seltzer in Support of Plaintiffs' Motion for Summary Judgment (Seltzer Decl.) ¶¶ 2, 24, 31; Declaration of Jonathan Bishop in Support of Plaintiffs' Motion for Summary Judgment (Bishop Decl.) ¶ 31; Declaration of Teresa Seidel in Support of Plaintiffs' Motion for Summary Judgment (Seidel Decl.) ¶ 4; Dkt. No. 30-16 ¶ 11; Dkt. No. 30-22 ¶ 31; Declaration of Kathleen M. Baskin (Baskin Decl.) ¶¶ 19-23.); Declaration of David Davis in Support of Plaintiffs' Motion for Summary Judgment (Davis Decl.) ¶¶ 5-6; Declaration of Rebecca Roose in Support of Plaintiffs' Motion for Summary Judgment (Roose Decl.) ¶¶ 10-11, 19-22.

substantial litigation or in the 2019 Rule because it was in place only for a short period of time. AR 11574, Topic 1 at 29; Topic 11 at 12-25. The Agencies, however, ignore the fact that for many decades the Agencies' regulations consistently covered a far wider scope of waters than are covered under the 2020 Rule. The 1980s regulations defined "waters of the United States" broadly, as did the 2008 *Rapanos* Guidance, which implemented Justice Kennedy's significant nexus test and defined "waters of the United States" to include ephemeral streams and wetlands that are now excluded. *Rapanos* Guidance, AR 11695 at 4-11. The 1980s definition and the *Rapanos* Guidance have remained in place and were applied by the Agencies both during the litigation and stay of the 2015 Rule and after the 2019 Rule was promulgated, demonstrating that reliance on a broader, more protective definition of "waters of the United States" was long-standing and reasonable. *See* 84 Fed. Reg. at 56,626, 56,630.

The Agencies also assert that they have addressed the states' reliance interests because there was ample notice that the 2015 Rule would be rescinded and the Agencies engaged in the rulemaking for the 2019 Rule and the 2020 Rule. *See* AR 11574, Topic 1 at 29. But the Agencies offer no authority for their claim that any reliance interests in longstanding agency policy evaporate once an agency provides notice that it plans to change course. And the mere fact that the Agencies initiated notice-and-comment rulemaking related to the definition of "waters of the United States," during which time they received hundreds of thousands of comments describing the harm the new rule would cause, is insufficient under the APA. Instead, the Agencies were "required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *DACA*, 140 S. Ct. at 1915. The Agencies failed to do so in the 2020 Rule.

The Agencies' other contention that "even if serious reliance interests were at issue, which they are not, the agencies have provided a thorough and reasoned explanation for the changed definition," AR 11574, Topic 1 at 29-30, 107-10, is unavailing. Rather than carefully balance the states' reliance interests against other policy factors motivating the 2020 Rule, the Agencies simply state that "Congress envisioned a major role for the states in implementing the CWA" and "[t]he ultimate response of states and tribes to this rule would not change the agencies'

interpretation of the scope of their legal authority." *Id.* at 28. As the Supreme Court has explained, the Agencies must "weigh any such interests against competing policy concerns." *DACA*, 140 S. Ct. at 1915. Regardless of whether the Agencies' explanation for their changed position is "thorough and reasoned"—which it is not—the Agencies have failed to balance the States' and Cities' significant reliance interests against any "competing policy concerns."

This arbitrary failure to consider the States' and Cities' reliance interests has serious real-world consequences. The States and Cities are faced with the decisions of whether and how to establish and expand water pollution control programs to protect the countless waters no longer protected by the CWA. *See* Argument, Section III, *infra*. These efforts by the States and Cities will require long-term investment of significant resources, but in the meantime water quality, and the States' and Cities' important interests in their wildlife and public property, will be exposed to degradation and increased risk of harm. *Id.*

II. THE 2020 RULE IS AN IMPERMISSIBLE INTERPRETATION OF THE CWA

While the Agencies are authorized to promulgate regulations interpreting the scope of the "waters of the United States" protected by the Act, here their interpretation constitutes an unreasonable construction of the Act that is not entitled to any deference whatsoever. *See The Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1061- 62 (9th Cir. 2003) (*Wilderness Society*). "An agency's interpretation of statutory authority is examined 'in light of the statute's text, structure and purpose.'" *Altera*, 926 F.3d at 1088; *see also United States v. Dailey*, 941 F.3d 1183, 1192 (9th Cir. 2019) (courts do not reflexively defer to agencies' interpretations of statutes). The interpretation fails if it is "unmoored from the purposes and concerns" of the statutory regime. *Judulang v. Holder*, 565 U.S. 42, 64 (2011); *see also Altera*, 926 F.3d at 1088. A statutory interpretation "is not a permissible (or reasonable) construction of the statute [if] it is directly at odds with the text and purpose of the Act." *NRDC v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 879 (9th Cir. 2005).

The 2020 Rule adopts an impermissible and unreasonable interpretation of "waters of the United States" because the Rule categorically excludes all ephemeral streams, many wetlands, and interstate waters as an independent category. This interpretation is untethered from and conflicts

with the Act's text, structure, and essential objective, and contradicts Supreme Court precedent.

A. The 2020 Rule Is Unreasonable Because It Excludes Ephemeral Streams.

The Agencies' exclusion of ephemeral streams in the 2020 Rule relies on the *Rapanos* plurality's conclusion that ephemeral waters are not within the scope of "waters of the United States." *Rapanos,* 547 U.S. at 733-34. That interpretation by the Agencies constitutes an impermissible interpretation because most of the Supreme Court Justices in *Rapanos* agreed that interpreting the term "waters of the United States" to categorically remove ephemeral streams from its scope is contrary to the CWA's text, structure, and purpose. *Id.* at 769-70, 800. Justice Kennedy's concurrence together with Justice Stevens' dissent in *Rapanos* established the boundaries of the Agencies' discretion when interpreting the statutory language at issue. *See Vasquez v. Hillery*, 474 U.S. 254, 262 n.4 (1986) (agreement of five justices, even when not joining each other's opinions, constitutes a majority whose opinion carries "precedential weight"); *see also Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) (four dissenting Justices and a Justice concurring in the judgment who agree on a particular legal conclusion "form[] a majority to require application" of that legal conclusion). Therefore, Justice Kennedy's concurrence in *Rapanos*, which the Ninth Circuit has held is "controlling", *N. Cal. Riverwatch v. City of Healdsburg*, 496 F.3d 993, 995 (9th Cir. 2007) (*Healdsburg*), together with the four-Justice dissent in *Rapanos* forecloses an interpretation that excludes ephemeral streams as a whole because such an interpretation is inconsistent with the Act's text, structure and purpose and thus unreasonable and impermissible under *Chevron*. *Rapanos*, 547 U.S. at 769-770, 800.

1. The Rule Adopts the *Rapanos* Plurality's Exclusion of Ephemeral Streams.

The 2020 Rule is based on the *Rapanos* plurality opinion's exclusion of ephemeral streams. The Rule repeatedly cites "the plurality decision in *Rapanos*," 547 U.S. at 732, as the basis to exclude ephemeral streams, explaining that, "[a]ccording to the *Rapanos* plurality . . . the ordinary meaning of the term 'waters' does not include areas that are dry most of the year, and which may occasionally contain 'transitory puddles or ephemeral flows of water.' 547 U.S. at 733." 85 Fed. Reg. at 22,273.

> Under the final rule, ephemeral features . . . are not jurisdictional and do not become jurisdictional even if they episodically convey surface water from upstream relatively permanent jurisdictional waters to downstream jurisdictional waters in a typical year, and thereby help maintain the jurisdictional status of the upstream waters. This approach incorporates the plurality's requirement that jurisdictional waters be continuously present, fixed bodies of water and that dry channels, transitory puddles, and ephemeral flows be excluded from jurisdiction. 547 U.S. at 733–34; *see also id.* at 731.

Id. at 22,278, 22,289 (internal citations omitted) (the Agencies reasoned that ephemeral streams should be excluded because "the requirement that a tributary be perennial or intermittent and be connected to a traditional navigable water is reasonable and reflects the [*Rapanos*] plurality's description of a 'wate[r] of the United States' as '*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters.'"). As explained below, because the "relatively permanent waters" test was rejected by the controlling *Rapanos* opinion, the 2020 Rule is unlawful.

2. The Agencies' Exclusion of Ephemeral Streams Is Not Entitled to Deference Because the Controlling Rule of Law from *Rapanos* Rejects Such Exclusion as Impermissible Under the Act.

The Ninth Circuit has repeatedly held that Justice Kennedy's opinion in *Rapanos* is the controlling rule of law. *Healdsburg*, 496 F.3d at 999-1000; *United States v. Robertson*, 975 F.3d 1281, 1290-92 (9th Cir. 2017) *vacated on other grounds by* 139 S. Ct. 1543 (2019). EPA cannot dispute this point, having recently conceded that "Justice Kennedy's opinion in *Rapanos* provides 'the controlling rule of law' in the Ninth Circuit." Br. for U.S. EPA at 32-35, *Sackett v. U.S. EPA*, No. 19-35469 (9th Cir. June 22, 2020). Moreover, five Justices in *Rapanos* concluded that an interpretation of "waters of the United States" that excludes ephemeral streams is contrary to the Act's text, purpose, and structure. *Rapanos*, 547 U.S. at 769-770, 800.

Justice Kennedy's *Rapanos* opinion flatly rejected the plurality's relatively permanent waters test, explaining that "[t]he plurality's first requirement—permanent standing water or continuous flow, at least for a period of 'some months,'—makes little practical sense in a statute concerned with downstream water quality." *Id.* at 769 (internal citations omitted). "Congress could draw a line to exclude irregular waterways," e.g., ephemeral streams, "but nothing in the statute suggests that it has done so." *Id.* at 769-770. "Quite the opposite, a full reading of the

dictionary definition *precludes* the plurality's emphasis on permanence . . ." *Id*. (emphasis added). The four-Justice dissent, led by Justice Stevens, agreed that the plurality's "relatively permanent waters" standard was "without support in the language and purposes of the Act or in our cases interpreting it." *Id.* at 800 (quoting Justice Kennedy's concurrence). For these and other reasons, both Justice Kennedy and the four-Justice dissent rejected the plurality's "relatively permanent waters" test as "inconsistent with the Act's text, structure, and purpose." *Rapanos*, 547 U.S. at 769-770, 800. This conclusion is the controlling rule of law from *Rapanos*. *See Vasquez*, 474 U.S. at 262 n.4; *see also Moses H. Cone Mem. Hosp.*, 460 U.S. at 17.

B. *Brand X* Does Not Save the 2020 Rule.

The 2020 Rule cannot be saved by the Agencies' invocation of *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (*Brand X*). That case held that a *lower* court's "construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior [lower] court decision holds that its construction follows from the *unambiguous* terms of the statute and thus leaves no room for agency discretion." *Id.* at 982 (emphasis added). But *Brand X* has no application here.

As an initial matter, *Rapanos* is a Supreme Court decision, and "it is far from settled that *Brand X* applies to prior decisions of the Supreme Court." *MikLin Enters, Inc. v. Nat'l Labor Relations Bd.*, 861 F.3d 812, 823 (8th Cir. 2017) (en banc). *Brand X* did not address whether an agency may defy Supreme Court precedent. 545 U.S. at 1003 (Stevens, J., concurring) (observing that the Court's holding "would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity").

Tellingly, the Supreme Court has rejected invocation of *Brand X* where the agency's statutory interpretation was contrary to a prior Supreme Court decision, even where the statute was ambiguous. *See United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 486-87, 488 (2012) (rejecting agency's *Brand X* argument that earlier Supreme Court decision "cannot govern" the case at issue, notwithstanding that the earlier decision acknowledged the statute's "ambiguity"); *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 525, 528 n.2 (2009) (rejecting *Brand X* argument where agency's interpretation of an "ambiguity" in the statute contradicted

prior Supreme Court decisions). Thus, the Agencies may not rely on *Brand X* here because *Brand X* did not eliminate the ordinary application of stare decisis, which applies when a Supreme Court decision interprets a statute, regardless of whether that decision "focused only on statutory text" or "relied on the policies and purposes animating the law." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 112 (1989) ("A rule of law that is the product of judicial interpretation of vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on plain meaning of statute.").

Five Justices in *Rapanos* rejected the interpretation the Agencies espouse, and, in any event, "*Brand X* does not require a court to defer to an agency's interpretations of judicial precedent." *MikLin*, 861 F.3d at 823; *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) (no deference owed to agency interpretation of "limitation[ ] put on [statutory] language by Supreme Court decisions" because courts, not agencies, are the "experts in analyzing judicial decisions") *vacated on other grounds by FEC v. Akins*, 524 U.S. 11 (1998). Rather, this Court is bound by Ninth Circuit precedent which (like every other Circuit to address the issue) holds that a water is "subject to the CWA" if it satisfies the "significant nexus" standard in Justice Kennedy's *Rapanos* concurrence, which protects ephemeral streams and many wetlands that lack surface water connection with jurisdictional waters. *Healdsburg*, 496 F.3d at 995.

Accordingly, the Agencies cannot rely on *Brand X* to issue a rule that excludes ephemeral streams and or other waters protected by Justice Kennedy's opinion. That controlling *Rapanos* opinion, endorsed by a majority of Supreme Court justices, held that the plurality opinion's exclusion of such waters is "inconsistent with the Act's text, structure, and purpose." *Rapanos*, 547 U.S. at 776. Because "*Rapanos* is unambiguously *against* the construction offered in the plurality opinion, on which the [2020] Rule is modeled. . . [and] *does* foreclose" an interpretation based on the plurality opinion, the 2020 Rule is unreasonable and impermissible. *Colorado v. EPA*, 445 F. Supp. 3d 1295, 1312 (D. Colo. 2020) (original emphasis) (preliminarily enjoining the 2020 Rule), *appeal pending*, Nos. 20-1238, 20-1262, 20-1263 (10th Cir.) (argued Nov. 18, 2020).

C. The Agencies' Interpretation of Section 101(b) and States' Rights and Responsibilities Under the Act Is Impermissible.

The 2020 Rule is contrary to law and fails under *Chevron* because it adopts an interpretation of the role of states under the Act that is unambiguously barred by Congress's intent. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. "Congressional intent may be determined by 'traditional tools of statutory construction,' and if a court using these tools ascertains that Congress had a clear intent on the question at issue, that intent must be given effect as law." *Wilderness Society*, 353 F.3d at 1059 (citing *Chevron*). That is because, even where "ambiguities in statutes" leave a gap for an agency to fill, courts "have not abdicated [their] judicial role" to "mark the bounds of delegated agency choice." *Negusie v. Holder*, 555 U.S. 511, 531 (2009) (Thomas, J., concurring in part). The federalism principles embodied by the Act favor broad federal water quality protections, not narrower ones, as the Agencies try to do here.

In drastically narrowing the scope of protected waters, the Agencies specifically rely on CWA Section 101(b), which states Congress's policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution," and "to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). But the Act's text, history, and caselaw regarding Section 101(b) demonstrate that Congress did not intend Section 101(b) to serve as a vehicle for the Agencies to undermine the Act's "objective . . . to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Indeed, Congress referred three times in Section 101(b) to preserving State authority to "prevent, reduce, and eliminate pollution," State efforts that further the Act's objective, *id.* § 1251(b), and Congress then effectuated that policy in Section 510, making clear that States can enact regulations beyond the federal CWA floor but not less stringent regulations. *Id.* § 1370. A contrary reading makes no sense at all.

The primary purpose of Section 101(b) is to preserve states' authority to protect their waters and to provide for state operation of the CWA permit programs, not to defer to hypothetical

state regulation as a counterweight to the Act's objective to restore and maintain national water integrity, and certainly not to reduce the scope of federally protected waters. The Act's legislative history thus makes clear that Congress meant in Section 101(b) only to reinforce the "responsibility of states to prevent and abate pollution *by* assigning them a large role in the national discharge permit system established by the Act." Dkt. No. 31-1, Ex. P (emphasis added). The Agencies' interpretation is also belied by the very reason Congress enacted the CWA in 1972: to *replace* an ineffective patchwork of state laws with a strong national floor of federal water pollution controls. *See* pp. 2-4, *supra*; *City of Milwaukee*, 451 U.S. at 318; *City of Arcadia v. EPA*, 411 F.3d. 1103, 1106 (9th Cir. 2005) (states' Section 101(b) role "in combating pollution" is consistent with CWA's "goals and policies"). In defiance of these two indisputable facts, however, the Agencies attempt to ascribe to Congress an intent *not* to replace that ineffective patchwork of state laws with a strong national floor but instead to continue that failed policy. Neither the CWA's text nor its purpose or history support such a counterintuitive reading.

Contrary to this unambiguous Congressional intent and context, the Agencies assert that the 2020 Rule "strikes a . . . balance between Federal and State waters" that "carries out Congress' overall objective" while "preserv[ing] the traditional sovereignty of States." 85 Fed. Reg. at 22,252. Yet the Rule's underlying assumption, that the definition for "waters of the United States" must "balance" between Federal and State waters, has no basis in the Act's text. Likewise, the Rule's proclamation that Congress demanded that the Agencies prioritize the "traditional sovereignty of States" is similarly bereft of any statutory foundation, as a protective definition of "waters of the United States" does not infringe on state authority. The Act established a federal prerogative "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and allocated to the states discrete aspects of the federal programs necessary to achieve this purpose. And then, in Section 510, Congress *preserved* traditional state authority to establish both stricter and broader water pollution controls than federal law requires to promote that animating objective but expressly *prohibited* states from "adopt[ing] or enforc[ing]" any water pollution control standard that is "*less* stringent" than an existing federal standard to prevent states from undermining that objective. 33 U.S.C. § 1370 (emphasis added).

The Supreme Court has confirmed what the Act's text, purpose, and context makes plain. In *EPA v. California ex. rel. State Water Resources Control Board*, for example, the Court stated that "[c]onsonant with its policy 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,' Congress also provided that a State may issue [Section 402] permits 'for discharges into navigable waters within its jurisdiction,' but only upon EPA approval of the State's proposal to administer its own program." 426 U.S. 200, 207 (1976) (quoting Section 101(b) (33 U.S.C. § 1251(b)) & § 1342(b)) (footnote omitted). Similarly, in *Ouellette*, the Court explained that Section 101(b) gives states "a significant role in protecting their own natural resources" and gave as examples the authority given to states to issue Section 402 permits to "require discharge limitations more stringent than those required by the Federal Government," and to issue Section 401 water quality certifications for federally licensed projects in their states. 479 U.S at 489-90 (citing 33 U.S.C. §§ 1251(b), 1341(a)(1), 1370, 1342(b)). Accordingly, states' rights under the CWA reflect the states' responsibilities to perform their own set of obligations under "a regulatory 'partnership,'" *Ouelette*, 479 U.S. at 490, which is a "partnership between the States and the Federal Government animated by a *shared objective*: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas*, 503 U.S. at 101 (emphasis added).[12]

The Act's structure demonstrates that the role of states under the CWA framework is focused on the following: (i) implementing the Act's regulatory programs under Sections 402 and 404, when authorized, as well as developing water quality standards under Section 303; (ii) reviewing federally-licensed projects and approving or denying certifications under Section 401; and (iii) implementing and enforcing any additional state water quality protections that go beyond the national floor established by the Act. 33 U.S.C. §§ 1251 (b), 1313, 1341, 1342(b), 1344(h), 1370. And, indeed, those are the state roles Congress specified in Section 101(b) and elsewhere in

[12] *See also County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471, 1476 (2020), (observing that Section 101(b) evidenced Congress's intent that states have autonomy for "groundwater pollution and nonpoint source pollution," as opposed to "regulation of identifiable sources of pollutants entering navigable waters").

the Act. 33 U.S.C. §§ 1251(b) ("manage the construction grant program"; "implement" the Section 402 and 404 permit program); 1370 (state authority to establish stricter and broader water pollution control regulations). Thus, nothing in the text of Section 101(b) or the Act as a whole authorizes the Agencies to "strike a balance between Federal and State waters"—i.e., carving out some waters as subject to state jurisdiction alone where the record demonstrates that doing so would undermine Congress' objective in Section 101(a)—when developing the regulatory definition of "waters of the United States."

In fact, a balancing between state and federal waters, or between the Act's clean water objective and state sovereignty, that narrows the scope of federally protected waters directly conflicts with the CWA. Congress intended the waters of the United States to be defined as broadly as possible, regardless of state sovereignty and the roles of states under the CWA framework. *See Riverside Bayview*, 474 U.S. at 133 ("Congress chose to define [navigable waters] broadly" as "the waters of the United States"); H.R. Rep. No. 92-911 at 818, S. Conf. Rep. No. 92-1236, at *3822 (Congress intended the term "waters of the United States" be "given the broadest possible constitutional interpretation"). Indeed, a broad regulatory definition of federally protected waters that is not based on the scope of waters protected (or that may be protected) by individual states is consistent with and furthers Congressional intent. The Act was specifically enacted to establish a national floor of water quality protections and replace the prior failed federal regime which relied on state protections alone to improve the quality of the Nation's waters. S. Rep. No. 92-414, at 2 - 7 (1971) (1971 WL 11307, at *3669-*3674) (explaining that, for the more than two decades prior to the 1972 CWA Amendments, "Federal legislation in the field of water pollution control has been keyed primarily to [the] principle [that] … States shall lead the national effort to prevent, control and abate water pollution" with the federal role "limited to support of, and assistance to, the States" and concluding that "the Federal water pollution program … has been inadequate in every vital aspect").

By creating a definition for "waters of the United States" based on a rationale that defies the established meaning of Section 101(b) and is irreconcilable with other sections of the statute and the Act's history and purpose, the Agencies contradict and undermine the cooperative

federalism Congress intended the CWA to achieve. Rather than further federalism, the 2020 Rule abdicates federal responsibility and weakens the important national floor of water quality protections that Congress set out to establish in the CWA. In fact, the Rule punishes states that adopt strong clean water safeguards by allowing states with weaker laws to effectively undermine and undo downstream states' efforts to protect water quality in their states. *See Rapanos,* 547 U.S. at 777 (citing Section 101(b) and noting that "the Act protects downstream States from out-of-state pollution that they themselves cannot regulate"). Because this is clearly not what Congress intended when it enacted the CWA in 1972, *see, e.g.*, 33 U.S.C. §§ 1251(a), 1370, the Agencies' contrary interpretation in the Rule must fail.

Nor can the Agencies justify narrowing the "waters of the United States" definition by invoking Section 101(b)'s acknowledgement of the "primary responsibilities and rights of States" to "plan the development and use (including restoration, preservation and enhancement) of land and water resources." *See* 85 Fed. Reg. at 22,262. While development impacting a waterbody deemed to be a "water of the United States" may be subject to CWA permitting, that fact does not take primary *planning* responsibility away from state or local authorities; it merely establishes that a CWA permit among other local, state, or federal permits may be needed for the activity.

Equally without merit is the Agencies' contention that "waters of the United States" must be defined narrowly because the Act's "non-regulatory programs," such as research and funding programs to assist states in water quality protection, apply to "the Nation's waters" broadly. *See* 85 Fed. Reg. at 22,253, 22,269. Controlling pollution under the Act's regulatory programs and assisting states through research and grant programs are complementary, not mutually exclusive, ways to achieve Act's objective. *See Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782, 791-92 (4th Cir. 1988) (describing Congress' intent that EPA use "the threat [of withholding grant funds] and promise of federal financial assistance . . . to influence the states to adopt nonpoint source pollution control programs that will accomplish the Act's water quality goals") (internal citations omitted)). And since the "United States" and the "Nation" are synonymous, the Agencies' contention that "waters of the United States" are different from "the Nation's waters" is baseless. *Cf.* 85 Fed. Reg. at 22,253.

In sum, because the Agencies ground their new definition of "waters of the United States" on an interpretation of Section 101(b) that is unsupported by the Act, its history, and caselaw, the Rule must be set aside as "not in accordance with law." 5 U.S.C. § 706(2)(A).

D. The Agencies' Constitutional Concerns Do Not Justify the Rule.

The Agencies incorrectly claim that the 2020 Rule is necessary to "avoid regulatory interpretations of the [Act] that raise constitutional questions." 85 Fed. Reg. at 22,269. That claim is both remarkable and meritless. First, precedent makes clear that the Agencies' previous definition based on the significant nexus standard raises no constitutional concerns. Second, the Agencies do not even attempt to reconcile their new position with the contrary one they have taken for over four decades, including as recently as last year when, in their 2019 Rule, the Agencies expressly relied on the *Rapanos* Guidance and its embrace of the significant nexus standard—the constitutionality of which they now purport to doubt. 84 Fed. Reg. at 4198.

In any event, reliance on the "significant nexus" standard "raise[s] no serious constitutional or federalism difficulty." *Rapanos*, 547 U.S. at 782-83 (Kennedy, J., concurring). In fact, employing the significant nexus test does the precise opposite: it "prevents problematic applications of the statute" that could raise such concerns. *Id*. The Agencies rely on *SWANCC* to argue that elimination of the significant nexus standard is needed to avoid Commerce Clause implications. 85 Fed. Reg. at 22,273. But *SWANCC*, which endorsed the significant nexus standard, concerned abandoned intrastate waters that were isolated and lacked a significant nexus to other waters protected by the Act, and in any case did not decide any constitutional questions. *See Rapanos*, 547 U.S. at 766-67 (Kennedy, J., concurring); *SWANCC*, 531 U.S. at 162, 167, 174.

Moreover, the polluting activities controlled by the Act are economic in nature and subject to regulation under the Commerce Clause. *See, e.g., Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 340 n.3 (1992) (solid waste is an "article of commerce"); *Wickard v. Filburn,* 317 U.S. 111 (1942). Protecting both navigable waters and the waters that significantly affect them provides "'appropriate and needful control of activities and agencies which, though intrastate, affect that [interstate] commerce.'" *Rapanos*, 547 U.S. at 783 (Kennedy, J., concurring) (quoting *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co*., 313 U.S. 508, 525-26 (1941)). As the Court stated in

Hodel v. Virginia Surface Min. & Reclamation Ass'n., Inc., "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." 452 U.S. 264, 282 (1981).

E. The Rule's Exclusion of Interstate Waters as an Independent Category of "Waters of the United States" is Contrary to the Act's Text, History, and Purpose.

The Agencies' decision that interstate waters as a category are not "waters of the United States" contradicts clear Congressional intent as reflected in the Act's text and structure and therefore fails under *Chevron* step one. *See Wilderness Society*, 353 F.3d at 1059. Federal jurisdiction over interstate waters under the Act, regardless of their navigability, has been longstanding and essential. In the CWA, Congress intended to prevent harms to downstream states from such detrimental upstream activities.

In a departure from all previous agency definitions, the 2020 Rule no longer includes interstate waters as an independent category of "waters of the United States." Instead, interstate waters are protected only if they otherwise meet the new narrower definition of "waters of the United States." AR 11574, Topic 1 at 26. The Agencies' failure to protect all interstate waters is contrary to the plain language, structure, and history of the Act and defies controlling precedent. As waters spanning state boundaries, interstate waters are unquestionably subject to federal jurisdiction under the Act and must be included as a category under any definition of the "waters of the United States." Failure to do so is an abdication of a core premise of the Act's federalism.

The CWA's language clearly demonstrates that the Act protects all interstate waters. Enacted in 1972, Section 303(a) of the Act provides, in pertinent part, that any pre-existing "water quality standard applicable to *interstate waters* . . . shall remain in effect," unless determined by EPA to be inconsistent with any applicable requirements in effect prior to 1972. 33 U.S.C. §1313(a) (emphasis added). The Act's specification of protection for interstate waters in the section setting forth the Act's foundational water quality standards requirements demonstrates that interstate waters are categorically protected by the Act. Without reasoned explanation and in conflict with bedrock rules of statutory interpretation, *Lowe v. S.E.C.*, 472 U.S. 181, 219 (1985)

("fundamental axiom of statutory interpretation that a statute is to be construed so as to give effect to all its language."), the Agencies ignore section 303(a)'s plain language and state that it "was referring to interstate navigable waters," despite the fact that the word "navigable" is not in section 303(a). 85 Fed. Reg. at 22,284.

In addition to conflicting with the Act's plain language, the Agencies' exclusion of interstate waters also ignores that the "Federal Water Pollution Control Act as it existed prior to the 1972 Amendments …. 'ma[de] it clear that it is federal, not state, law that in the end controls the pollution of interstate *or* navigable waters." *Illinois v. City of Milwaukee*, 731 F.2d 403, 408 (7th Cir. 1984) (emphasis added) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 102 (1972)). The Agencies' new interpretation, reading out protections for interstate waters, also ignores the purpose of the 1972 Amendments, which was to expand, not narrow, federal protection of waters. *See* S. Rep. No. 92-414, at 7 (1971) (1971 WL 11307, at *3674) (prior mechanisms for abating water pollution "ha[d] been inadequate in every vital respect"); *City of Milwaukee*, 451 U.S. at 317 (in passing the CWA, Congress "occupied the field by establishment of a comprehensive regulatory program . . . *not merely another law 'touching interstate waters*'" (emphasis added)). As a means to protect interstate waters, the 1972 Amendments superseded the federal common law of nuisance in favor of a statutory "all-encompassing program of water pollution regulation." *City of Milwaukee*, 451 U.S. at 318. Given that Congress's purpose in the 1972 Amendments was to expand federal protections for waters, and that prior to the Amendments to the Act already protected navigable and interstate waters as separate categories, the Act necessarily continued to protect interstate waters after 1972.

The Agencies' attempt to distinguish seminal Supreme Court cases demonstrating the Act's applicability to interstate waters regardless of navigability ignores the Court's analysis in those cases. *See* 85 Fed. Reg. at 22,286 n. 43. In both *Ouellette* and *Arkansas*, the Court explained that the Act had established a broad statutory scheme for addressing interstate water pollution disputes. The Court in *Ouellette* observed that, *regardless of navigability*, "the Act applies to virtually all surface water in the country," and that "the control of interstate pollution is primarily a matter of federal law." 479 U.S. at 486, 492 (citations omitted). Similarly, the Court

in *Arkansas* explained that "interstate water pollution is controlled by *federal* law" and "the Act's purpose [is to] authoriz[e] the EPA to create and manage a uniform system of interstate water pollution regulation." 503 U.S. at 110 (emphasis in original).

The Agencies' contention that they were required to remove interstate waters because the Southern District of Georgia found the interstate waters provisions of the 2015 Rule unlawful has no merit. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1358-60 (S.D. Ga. 2019). First, the Agencies' decision to propose the removal of interstate waters *pre-dated* the Southern District of Georgia's decision by more than 6 months, *see* 84 Fed. Reg. 4154, 4171 (Feb. 14, 2019) (proposing to remove the interstate waters category), demonstrating unequivocally that the Agencies were not motivated by that court's ruling. Second, *Georgia* is neither correct nor binding and, for the reasons provided above, should be disregarded. *See United States v. Ensminger*, 567 F.3d 587, 591 (9th Cir. 2009) ("'a district court opinion does not have binding precedential effect,' especially one from another federal circuit" (citations omitted)). Remarkably, in *Georgia*, the court did not even address the language of Section 303(a), which provides yet another reason to reject its conclusion, as the Agencies should have done here.

In summary, removing interstate waters as a category of protected waters under the CWA is contrary to statutory text, history, Congressional intent, and established case law.

III. THE 2020 RULE HARMS THE INTERESTS OF THE STATES AND CITIES, GIVING THEM STANDING TO BRING THIS ACTION

States are "entitled to special solicitude in [Article III] standing analysis" and, given their interests "in all the earth and air within [their] domain," are routinely held to have standing to challenge actions by federal environmental agencies. *Massachusetts v. EPA*, 549 U.S. 497, 518-20 & n.17 (2007). To establish standing, only one party must satisfy the requirement that plaintiff's injury be fairly traceable to the defendant and redressable by a decision in their favor. *Id*. at 518. Here, the States and Cities easily establish standing.

The States and Cities have and will continue to suffer four types of injuries traceable to the 2020 Rule that can be redressed by vacatur of the Rule: (1) harm to their waters and water protection programs; (2) harm to wildlife; (3) harm to property; and (4) increased monetary

expenditures and administrative burdens. These four injuries are detailed in more than 30 declarations, including expert testimony, showing that "all states will be significantly impacted" by the 2020 Rule and that the States' and Cities' "harms threatened by the Rule will be extensive, long-lasting, and nationwide."[13] Such harms easily establish state standing. *See Massachusetts*, 549 U.S. at 519 (standing shown by federal agency decision's environmental harm); *California v. Block*, 690 F.2d 753, 776 (9th Cir. 1982) (standing shown by federal policy's effect on State lands); *California v. Azar*, 911 F.3d 558, 571-73 (9th Cir. 2018) (standing shown by federal rule's creation of a regulatory gap that state would need to expend resources to fill).

Harm to the States' and Cities' waters and water protection programs. By leaving ephemeral streams, interstate waters, and over half of the nation's wetlands unprotected by the Act, the 2020 Rule threatens entire watersheds, including 4.8 million miles of streams[14] and 16.3 million acres of non-floodplain wetlands.[15] The arid West—where several States are located—will be particularly hard hit; for example, more than 85% of stream miles in New Mexico's key watersheds are no longer protected[16] and 40% of wetland acres in New Mexico are at risk of destruction.[17] Because of the Rule, 25 to 45% of New Mexico's stormwater general permits and 50% of its individual permits are no longer required.[18] As a result, pesticides, paint solvents, acidic wastewater, and other pollutants will discharge into New Mexico waters—including the Tijeras Arroyo, Gila River, and Rio Hondo watersheds—without regulatory limit.[19]

The 2020 Rule severely harms downstream States and Cities by increasing the risks of pollution from upstream states. By excluding numerous waters from the Act's jurisdiction, the 2020 Rule significantly curtails the Section 402 and 404 permit programs that previously protected the States' and Cities' natural resources and citizens from upstream pollution.[20] For example, New York does not regulate smaller wetlands because it relies on the Army Corps' operation of the

[13] Dkt. No. 30-18, ¶¶ 3, 21
[14] *Id.* ¶¶ 3-5, 14, 21-22, 24, 34.
[15] *Id.* ¶¶ 5, 16, 34-43.
[16] *Id.* ¶¶ 3, 24.
[17] *Id.* ¶¶ 3, 36-39.
[18] Roose Decl. ¶ 20.
[19] *Id.* ¶¶ 9, 15-17.
[20] Dkt. No. 30-8 ¶ 9.

Section 404 program; while New York works to expand its state programs to fill the regulatory gap created by the 2020 Rule (work that itself constitutes an injury establishing standing), many of New York's wetlands could be filled and therefore would not be able to reduce downstream pollution before its waters flow into New Jersey.[21] Further, upstream harms will affect Maryland because the health of Maryland's Chesapeake Bay relies upon water protections in six upstream jurisdictions—including plaintiffs suffering from a regulatory gap in protections as well as non-plaintiff states such as West Virginia and Delaware.[22]

Moreover, because many states upstream of the States and Cities have laws preventing the imposition of stricter water pollution controls than those under the CWA, the Rule allows increased upstream pollution that threatens to significantly degrade water quality in the States and Cities.[23] For example, California will be harmed by increased pollution in upstream states that would flow to California via interstate waters, such as the Colorado River, which is an important source of drinking water,[24] and the Amargosa River, which is ephemeral for the majority of its length and subject to land use activities—such as Nevada's largest working dairy farm and hazardous waste disposal—that may discharge pollutants.[25]

Harm to the States' wildlife. Plaintiffs also are injured by the Rule's exclusion of waters that are habitat for fish and other animals owned, regulated, or held in trust by the States.[26] For example, habitats for scores of threatened and endangered species in California and other states

[21] Jacobson Decl. ¶¶ 7-8, 9-14; Dkt. No. 30-7 ¶¶ 13-15; *see also* Baskin Decl. ¶¶ 13-14 (discussing a similar regulatory gap in Massachusetts, and identifying specific projects involving fill of wetlands that are no longer protected by either federal or state law).

[22] Dkt. No. 30-14 ¶¶ 5, 7 (The 2020 Rule will also harm Maryland by removing protection for an estimated 10,000 acres of wetlands in the Nanticoke River watershed (a tributary to Chesapeake Bay) within Delaware, thus eliminating the flood protection functions these wetlands provide to communities downstream in Maryland.)

[23] Bishop Decl. ¶ 20; Dkt. No. 30-18 ¶ 23; Ariz. Rev. Stat. Ann. § 49-104(A)(16); Utah Code Ann. § 19-5-105.

[24] Bishop Decl. ¶¶ 21, 23; *see also* Mrazik Decl. ¶ 9; Dkt. No. 30-13 ¶ 12; Dkt. No. 30-22 ¶ 20.

[25] Dkt. No. 30-20 ¶ 5-6, 12-13. The 2020 Rule will likewise harm Michigan given that its water quality depends on adequate protection in other Great Lakes states. Seidel Decl. ¶ 3.

[26] Dkt. 30-18 ¶¶ 4, 16, 27-33, 38; Dkt. No. 30-6 ¶ 10; Declaration of Annee Ferranti in Support of Plaintiffs' Motion for Summary Judgment (Ferranti Decl.) ¶¶ 9-15; Dkt. No. 30-12 ¶¶ 10-12; Dkt. No. 30-20 ¶¶ 13-17. For example, California wildlife are "publicly owned" and it is the "state's policy to conserve and maintain wildlife for citizens' use and enjoyment." *Betchart v. Department of Fish & Game*, 158 Cal.App.3d 1104, 1106 (1984); Cal. Fish & Game Code, § 1801.

face increased degradation under the Rule.[27] North Carolina will suffer a large loss of wetlands under the 2020 Rule and the resulting decline in water quality and loss of wildlife habitat will impact the 70% of rare and endangered plants and animals statewide that rely on these wetlands, as well as North Carolina's $430 million commercial and $3.9 billion recreational fisheries.[28]

Harms to the States' and Cities' property. The Rule's elimination of protections for several upstream waters that trap pollutants and store water threatens downstream States and Cities with more frequent flooding and increased pollution.[29] For example, New York owns 658 facilities with replacement value of over $254 million located in 100-year floodplains that are directly at risk from the 2020 Rule.[30] This does not include State-owned or managed roads, bridges, culverts, rail lines, airports and marine facilities that are also located in flood zones and will also be threatened by implementation of the 2020 Rule.[31] Likewise, in the District of Columbia, more than $1 billion in District-owned property and approximately 10,000 District residents are located within floodplains.[32] The total economic loss from a 100-year storm along the Potomac and Anacostia Rivers is estimated at $316 million.[33]

Increased monetary expenditures by and administrative burdens on the States and Cities. The States and Cities have already and will increasingly need to expend money and resources to fill the regulatory gaps created by the 2020 Rule. For example, to mitigate the Rule's harm, the District of Columbia has developed local regulations for dredge and fill activities in wetlands and streams no longer subject to the Act's protection, has diverted approximately 2,520 hours of staff time from other activities, and is in the process of hiring an additional employee to implement a new permitting program.[34] Similarly, New York has devoted staff time and funding to identify and map wetlands no longer protected by the Act that will need to be protected under new state

[27] Dkt. No. 30-18 ¶¶ 4, 27, 40-41, 49; Dkt. No. 30-20 ¶¶ 14-16; Dkt. No. 30-12 ¶¶ 8-10; Ferranti Decl. ¶¶ 11, 14-19.
[28] Dkt. No. 30-5 ¶¶ 12-13, 17-18.
[29] Dkt. No. 30-3 ¶ 11; Dkt. No. 30-7 ¶¶ 4, 7-8; Dkt. No. 30-18 ¶¶ 5, 15, 17, 34, 38, 41-42.
[30] Dkt. No. 30-22 ¶ 38
[31] *Id.*
[32] Seltzer Decl. ¶ 3.
[33] *Id.* ¶ 18.
[34] *Id.* ¶¶ 11-14.

efforts.[35] Oregon has likewise devoted tens of thousands of dollars in staff time to filling the regulatory gap created by the Rule and expects to incur significant additional costs in the future.[36] California, Massachusetts, Wisconsin, and Virginia will also incur costs from increased staffing and staff training to address the regulatory gaps left by the Rule.[37] In addition, New Mexico will need to overhaul its groundwater and surface water quality protection regulations to create a new permitting program—at a cost of over $7.5 million annually, which is a 115% increase in New Mexico's budget for all surface water programs.[38] Until this new program is in place, New Mexico has sought to mitigate the removal of water protections by diverting funding from other areas and diverting work time from several staff members to address the federal regulatory gap.[39]

CONCLUSION

For all of these reasons, the Court should grant the States' and Cities' motion for summary judgment and vacate the 2020 Rule as arbitrary, capricious, and contrary to law.

[35] Jacobson Decl. ¶¶ 13-14.
[36] Mrazik Decl. ¶ 8.
[37] Bishop Decl. ¶¶ 26-29, 38, 40, 43-44; Baskin Decl. ¶¶ 20-23; Davis Decl. ¶¶ 6-7; Declaration of David Siebert in Support of Plaintiffs' Motion for Summary Judgment ¶ 2.
[38] Roose Decl. ¶¶ 20, 22.
[39] *Id.* ¶ 23.

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SIGNATURE ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from each of the other signatories.

DATED: November 23, 2020

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Tatiana K. Gaur

LA2020300885

CERTIFICATE OF SERVICE

Case Name: **State of California, et al. v. Andrew Wheeler, et al.**

Case No.: **3:20-cv-03005-RS**

I hereby certify that on November 23, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 23, 2020, at Los Angeles, California.

Blanca Cabrera	/s/ Blanca Cabrera
Declarant	Signature

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